

# WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

## INVENTORY AND REVIEW – INSERT

### LONG TITLE

#### General Description:

This bill . . . including creating the Government Competition and Privatization Commission and the Government Competition and Privatization Council.

#### Highlighted Provisions:

This bill:

- ▶ . . . .
- ▶ creates the Government Competition and Privatization Commission and the Government Competition and Privatization Council;
- ▶ establishes the duties of the commission, including rulemaking;
- ▶ establishes the duties of the council, including creating an inventory of activities of government entities;
- ▶ . . . .
- ▶ imposes requirements for review of privatization; ~~and~~
- ▶ requires the governor to review certain commercial activities; and
- ▶ . . . .

#### Monies Appropriated in this Bill:

None

#### Other Special Clauses:

None

#### List of sections affected:

AMENDS:

ENACTS:

. . . .

63-55d-103

. . . .

63-55d-204

63-55d-205

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31 . . . .

32 [~~63-55d-505~~]

33 63-55d-601

34 63-55d-602

35 63-55d-603

36 63-55d-604

37 63-55d-605

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39 Statutory text:

## 40 **CHAPTER 55d. GOVERNMENT COMPETITION AND PRIVATIZATION ACT**

41

### 42 **Part 1. General Provisions**

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#### 45 **63-55d-102. Definitions**

46 As used in this chapter:

47 . . . .

48 (7) "Competitive program" means a program developed by the council in accordance with  
49 Section 63-55d-204.

50 (10) "Council" means the Utah Government Competition and Privatization Council created in  
51 Section 63-55d-202.

52 . . . .

53 (12)(a) "Government entity employee" means a person:

54 (i) employed by a government entity to engage in an activity; or

55 (ii) engaged to perform work for or to provide an activity to a government entity.

56 (b) "Government entity employee" includes:

57 (i) a salaried employee; and

58 (ii) a wage employee.

59 . . . .

60 (17) "Public or private performance analysis" means an analysis meeting the requirements of  
61 Section 63-55d-505.

62 . . . .

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### 63 **63-55d-103. Exemptions.**

64 Part 5, Commercial Activities Inventory and Review, does not apply to a  
65 transportation-related project initiated pursuant to Title 72, Transportation Code.

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### 67 **Part 2. Government Competition and Privatization Commission and Council**

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### 69 **63-55d-202. Government Competition and Privatization Council created.**

70 (1) There is created the Government Competition and Privatization Council consisting of 15  
71 members appointed as follows:

72 (a) the governor shall appoint:

73 (i) four government entity employees in the executive branch of a government entity; and

74 (ii) three members to represent a private enterprise;

75 (b) the Speaker of the House of Representatives shall appoint:

76 (i) two members of the House of Representatives; and

77 (ii) two members to represent a private enterprise; and

78 (c) the President of the Senate shall appoint:

79 (i) two members of the Senate; and

80 (ii) two members to represent a private enterprise.

81 (2)(a) Except as required by Subsection (2)(b), a council member shall serve until the sooner  
82 of:

83 (i) the expiration of a four-year term; or

84 (ii) the day on which the council member no longer holds the position required to be  
85 appointed under Subsection (1).

86 (b) A member of the council who is not a legislative member may not serve more than two  
87 consecutive terms. The remainder of a term to which a council member is appointed to fill a  
88 vacancy does not constitute a term in determining the council member's eligibility for  
89 reappointment.

90 (c) The governor shall, at the time of appointment or reappointment, adjust the length of  
91 terms to ensure that the terms of the council members are staggered so that approximately  
92 half of the council is appointed every two years.

93 (d) A council member shall serve until a successor is appointed.

94 (e) When a vacancy occurs in the membership of the council for any reason, the appointing

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95 authority shall appoint a replacement to the unexpired term in a manner consistent with  
96 Subsection (1).

97 (3) By no later than July 31 each year the council shall select one of its members to serve as  
98 chair of the council for a one-year term.

99 (4) The council shall meet as scheduled by the chair, except that the chair shall schedule a  
100 meeting at least quarterly.

101 (5)(a) Eight members of the council constitute a quorum of the council.

102 (b) An action of the council requires that:

103 (i) a quorum be present; and

104 (ii) a majority of the council members that are present vote for the action.

105 (6) (a) (i) A council member who is not a government employee may not receive  
106 compensation or benefits for the council member's service, but may receive per diem and  
107 expenses incurred in the performance of the council member's official duties at the rates  
108 established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

109 (ii) A council member who is not a government employee may decline to receive per diem  
110 and expenses for the council member's service.

111 (b) (i) A state government officer or employee council member who does not receive salary,  
112 per diem, or expenses from the council member's agency for the council member's service  
113 may receive per diem and expenses incurred in the performance of the council member's  
114 official duties from the council at the rates established by the Division of Finance under  
115 Sections 63A-3-106 and 63A-3-107.

116 (ii) A state government officer or employee council member may decline to receive per diem  
117 and expenses for the council member's service.

118 (c) (i) A local government council member who does not receive salary, per diem, or  
119 expenses from the entity that the council member represents for the council member's  
120 service may receive per diem and expenses incurred in the performance of the council  
121 member's official duties at the rates established by the Division of Finance under Sections  
122 63A-3-106 and 63A-3-107.

123 (ii) A local government council member may decline to receive per diem and expenses for  
124 the member's service.

125 (c) A legislator on the council shall receive compensation and expenses as provided by  
126 statute and legislative rule.

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127 (7) The department shall staff the council.

128

129 **63-55d-[202]203. Commission duties.**

130 (1) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the  
131 commission shall make rules to:

132 (a) define:

133 (i) "byproduct of a commercial activity"; and

134 (ii) "ordinary business channel";

135 (b) establish a commission accounting method in accordance with Section 63-55d-203;

136 (c) establish a procedure for preparing competitive impact statements that is:

137 (i) consistent with Section 63-55d-302; and

138 (ii) provides a process for issuing a request for proposals:

139 (A) to ensure that the request for proposals is distributed widely; and

140 (B) that is consistent with Title 63, Chapter 55, Utah Procurement Act;

141 (d) establish a procedure for an institution of higher education requesting an approval of the  
142 commission under Section 63-55d-303;

143 (e) establish one or more standards to recommend privatization of an activity of a  
144 government entity in accordance with Part 4, Privatization Requirements; ~~and~~

145 (f) establish processes required to carry out the functions of the council under Part 5,

146 Competitive Activities Inventory and Review; and

147 ~~[f]~~ (g) establish a procedure for a person to file a complaint that is consistent with Part ~~[5]~~ (6),  
148 Enforcement.

149 (2) The commission shall comply with Part 3, Government Competition Requirements:

150 (a) to review or approve a commercial activity of a government entity; and

151 (b) to review or approve a commercial activity of an institutional of higher education, including  
152 a charge for the sale of a byproduct of a commercial activity.

153 (3) The commission shall comply with Part 4, Privatization Requirements, to review  
154 privatization of an activity of a government entity;

155 (4) The commission shall comply with Part ~~[5]~~ (6), Enforcement, if a complaint is filed with the  
156 commission in accordance with Section 63-55d-~~[502]~~ 602.

157 (5) The commission shall communicate with private or public entities that address  
158 government competition with a private enterprise or privatization; and

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- 159 (6)(a) The commission shall prepare an annual report that:
- 160 (i) describes the commission's activities, including the commission's actions with respect to a
- 161 complaint filed under Section 63-55d-~~502~~602; and
- 162 (ii) makes recommendations, including the need for legislation, if any, to address an activity
- 163 of a government entity that the commission finds:
- 164 (A) is in competition with a private enterprise; or
- 165 (B) should be privatized;
- 166 (b) submit the annual report by no later than December 1 to the Legislature and the governor; and
- 167 (d) if the annual report includes a recommendation described in Subsection(6)(b)(ii)
- 168 regarding a government entity, file a copy of the recommendation with:
- 169 (i) the chief administrative officer of the government entity that is the subject of the
- 170 recommendation; and
- 171 (iii) the Office of Legislative Fiscal Analyst, for submission to the legislative appropriation
- 172 subcommittee that has responsibility related to that government entity.

173

### 174 **63-55d-204. Council duties**

- 175 (1) The council is an advisory committee that advises the commission regarding methods of
- 176 providing a portion or all of a commercial activity by a private enterprise.
- 177 (2) The council shall:
- 178 (a) comply with Part 5, Competitive Activities Inventory and Review, to create the required
- 179 inventory;
- 180 (b) develop an institutional framework for a statewide competitive program to encourage
- 181 innovation and competition within government entities;
- 182 (c) establish a system to encourage the use of feasibility studies and innovation to determine
- 183 where competition could reduce government costs without harming the public;
- 184 (d) advocate, develop, and accelerate implementation of a competitive program for a
- 185 government entity to ensure competition for a commercial activity;
- 186 (e) assist the commission in determining the privatization potential of a commercial activity,
- 187 including performing an analysis of cost and benefit of privatization;
- 188 (f) review the procurement process under Title 63, Chapter 56, Utah Procurement Code, and
- 189 make recommendations for:
- 190 (i) improving the use and efficiency of the process;

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- 191 (ii) releasing information to the public during all stages of the process; and  
192 (iii) ensuring accountability on the part of public officials and employees involved in the  
193 process;  
194 (g) develop proposals for:  
195 (i) preserving the traditional role of a private enterprise; and  
196 (ii) encouraging the expansion of existing, and the creation of new, private enterprises; and  
197 (h) review the practices of a nonprofit organization that may constitute inappropriate  
198 competition with a private enterprise.  
199 (3)(a) The council may apply for, accept, and expend a gift, grant, or donation from a public  
200 or private source to enable the council to better carry out its objectives.  
201 (b) A person who provides a gift, grant, or donation to the council is not eligible for a contract  
202 award that results from action of a council recommendation.  
203 (4) The council may not impose an unreasonable burden or cost in connection with a  
204 request of a government entity.  
205 (5) The council shall annually by November 1 report its findings and recommendations to the  
206 commission.

207

### 208 **63-55d-[203]205. Commission accounting method**

209 The commission by rule made in accordance with Title 63, Chapter 46a, Utah Administrative  
210 Rulemaking Act, shall establish an accounting method that:

- 211 (1) is similar to generally accepted accounting principles used by a private enterprise;  
212 (2) allows a government entity to identify the total actual cost of engaging in a commercial  
213 activity in a manner similar to how a private enterprise identifies the total actual cost to the  
214 private enterprise, including the following:  
215 (a) a labor expense, such as:  
216 (i) compensation and benefits;  
217 (ii) a cost of training;  
218 (iii) a cost of paying overtime;  
219 (iv) a cost of supervising labor; or  
220 (v) another personnel expense;  
221 (b) an operating cost, such as:  
222 (i) vehicle maintenance and repair;

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- 223 (ii) a marketing, advertising, or other sales expense;  
224 (iii) an office expense;  
225 (iv) a cost of an accounting operation, such as billing;  
226 (v) an insurance expense;  
227 (vi) a real estate or equipment cost;  
228 (vii) a debt service cost; or  
229 (viii) a proportionate amount of other overhead or of a capital expense, such as vehicle  
230 depreciation and depreciation of other fixed assets;  
231 (c) a contract management cost; and  
232 (d) another cost particular to a person supplying the good or service;  
233 (3) provides a process to estimate the taxes a government entity would pay related to  
234 engaging in a commercial activity if the government entity were required to pay federal, state,  
235 and local taxes to the same extent as a private enterprise engaging in the commercial  
236 activity; ~~and~~  
237 (4) allows an institution of higher education to calculate the market price of the sale of a  
238 byproduct of a commercial activity as described in Subsection 63-55d-303(4); and  
239 (5) is to be used by the council in the council's activities under this chapter.  
240 . . . .

### **Part 5. Commercial Activities Inventory and Review**

#### **63-55d-501. Council to create inventory**

- 244 (1) By no later than June 30, 2009, the council shall create an inventory of activities of a  
245 government entity in this state to classify whether the activity is:  
246 (a) a commercial activity;  
247 (b) an inherently governmental activity; or  
248 (c) neither a commercial activity or inherently governmental activity.  
249 (2) The council shall update the inventory created under this section at least every two years.  
250 (3) The council shall:  
251 (a) provide a copy to the commission of the inventory and an update to the inventory; and  
252 (b) make the inventory available to the public through electronic means.

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254 **63-55d-502. Governor to require review of commercial activities.**

255 (1) Beginning with fiscal year 2009-2010, the governor shall at least once every two fiscal  
256 years:

257 (a) select at least three commercial activities that are being performed by a government  
258 entity employee at a government entity for examination; and

259 (b) (i) require the Governor's Office of Planning and Budget to conduct the examination; or  
260 (ii) contract in accordance with Chapter 56, Utah Procurement Code with a private enterprise  
261 to conduct the examination.

262 (2) The governor may require that an executive branch state agency that is engaged in a  
263 commercial activity contract with a private enterprise for the commercial activity in  
264 accordance with Chapter 56, Utah Procurement Code, if the governor determines that  
265 contracting for the commercial activity:

266 (a) may result in a reduced cost or otherwise provide a measurable benefit to the state; and  
267 (b) assure that the commercial activity is accomplished in the most cost efficient and effective  
268 manner.

269

270 **63-55d-503. Unsolicited proposals**

271 (1) After receiving a notice required by Subsection (2), the governor may direct an executive  
272 branch state agency to perform a public or private performance analysis covering a  
273 commercial activity for which the commission or council receives a proposal that:

274 (a) meets the qualifications for the commercial activity;

275 (b) is unsolicited;

276 (c) is from a private enterprise; and

277 (d) is consistent with Part 2, Government Competition and Privatization Commission and  
278 Council.

279 (2) The commission or council shall notify the governor and Legislature within 30 days of the  
280 day on which the commission or council determines that it has received a proposal meeting  
281 the requirements of Subsection (1).

282 (3) To conduct a public or private performance analysis an executive branch state agency  
283 shall use the procurement methods of Chapter 56, Utah Procurement Code, to solicit  
284 proposals and bids from one or more private enterprises to make cost comparison decisions.

285 (4) The council shall explore methods to encourage a government entity to compete for a

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286 contract.

287

### 288 **63-55d-504. Duties of the Governor's Office of Planning and Budget**

289 (1) The Governor's Office of Planning and Budget shall:

290 (a) determine the amount of an appropriation that is no longer needed by an executive  
291 branch state agency because all or a portion of the executive branch state agency's function  
292 is privatized; and

293 (b) adjust the governor's budget recommendations to reflect the amount determined under  
294 Subsection (1)(a).

295 (2) The Governor's Office of Planning and Budget shall ensure that the governor meet a  
296 reporting requirement under this chapter.

297 (3) This section does not prevent the governor from recommending in a budget  
298 recommendation the restoration of a portion of the appropriation to an executive branch state  
299 agency reduced under this section.

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### 301 **Part [5]6. Enforcement**

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### 303 **63-55d-[501]601. Exemption from Administrative Procedures Act.**

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### 306 **63-55d-[502]602. Initial process for a complaint.**

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### 309 **63-55d-[503]603. Hearing – Costs – Termination of commercial activities.**

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### 312 **63-55d-[504]604. Injunction.**

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### 315 **63-55d-[505]605. Monitoring of compliance.**

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